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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 524

AKTIESELSKABET "CUZCO", as owner of the Norwegian Steamship *TOLUMA*,

Petitioner,

against

Steamship *SUCARSECO*, her engines, boilers, etc., SUBMARINE BOAT CORPORATION,

Respondent,

(and two other cases)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF.

WILLIAM H. MCGRANN,
Counsel for Petitioner.

INDEX.

PAGE

List of Authorities iii

Petition 1

Jurisdiction 1

I. Statement of Matter Involved 2

(a) The Facts 2

(b) The Suits 4

(c) Decisions Below 4

(d) Opinions Below 5

(e) Effect of decision 7

II. Reasons for Allowance of Writ 7

III. The Sole Question Presented 9

Brief in Support of Petition 12

First Point: The petitioner [*Toluma*] was legally obligated to make repairs at the port of refuge and deliver the cargo, or respond to damages to cargo; and the petitioner has the primary right of recovery from the tort feasor, *Sucarseco*, for these expenses, directly resulting from collision 12

Second Point: Cargo owners were not obligated to contribute toward *Toluma's* port of refuge expenses under the maritime law of General Average. Their obligation to *Toluma* arose only because of the terms of their contract with *Toluma, i. e.*, the Jason Clause 14

PAGE

THIRD POINT: The liability to contribute to *Toluma's* expenses which Cargo owners assumed by agreeing to the Jason Clause does not confer upon Cargo owners any right of recovery from owner of *Sucarseco*, which was a stranger to the contract 17

FOURTH POINT: Such rights as Cargo owners may have here to recovery of General Average contributions are secondary to *Toluma's* right of recovery from *Sucarseco*, and derivative only..... 19

LAST POINT: The petition for writ of certiorari should be granted..... 25

APPENDIX 26

List of Authorities.

PAGE

Angle v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1 18

Anglo-Algerian S. S. Co., Ltd. vs. *The Houlder Line, Ltd.* (1908), 1 K. B. 659 18

Anthony v. *Slaid*, 52 Mass. 290 17

Baltimore, The, 8 Wall. [75 U. S.] 377, p. 385 13

Brink v. *Wabash R. R. Co.*, 160 Mo. 87 17

Byrd v. *English*, 117 Ga. 192 18

Cattle v. *Stockton Waterworks Co.* [1875] L. R., 10 Q. B. 453 18

Cole's "General Average Law and Rules" 19

Connecticut Insurance Co. v. *New York R. R. Co.*, 25 Conn. 265 17

Conqueror, The, 166 U. S. 110, p. 125 13

Dale v. *Grant*, 34 N. J. L. 142 17

Earl v. *Lubbock* [1905], 1 K. B. 253 18

Elliott Steam Tug Co., Ltd. vs. *The Shipping Controller* (Court of Appeal) [1922], 1 K. B. 127, 139, 142 ..... 17, 18

Energia, The, 56 Fed. 124; 66 Fed. 604 ..... 16, 22, 23

Erie & Western Trans. Co. v. *Chicago*, 78 Fed. 42 23

Federal No. 2, The (C. C. A. 2), 21 Fed. (2d) 313 ..... 17, 18, 19

Gray's Harbor Tugboat Co. v. *Petersen*, 250 Fed. 956 23

Insurance Co. vs. *Brame*, 95 U. S. 754 ..... 6, 17

Irrawaddy, The, 171 U. S. 187 ..... 5, 8, 9, 13, 14, 15, 16, 22, 23, 24

Jason, The, 225 U. S. 32 ..... 5, 6, 8, 14, 15, 16

PAGE

Lady Pike, The, 21 Wall. [88 U. S.] 11, pp. 14-15 13
Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, pp. 440-1 13
Lowndes' General Average, 6th Edition, p. 37 19

Maggie Hammond, The, 9 Wall. [76 U. S.] 435, p. 458 13
Margaret J. Sanford, The (C. C., S. D., N. Y.), 37 Fed. 148, p. 152 13
Measure of The Damages in Maritime Collisions, The, 3rd Ed., by E. S. Roscoe, pp. 20-22 24
Milton vs. Story, 11 Vermont 101 17
Minnetonka, The [1905], Prob. Div. 206 24

Niagara, The v. Cordes, 21 How. [62 U. S.] 7, pp. 28-29 13
North Star, The, 106 U. S. 17, pp. 22, 28-29 21

Phoenix Ins. Co. v. Erie Transp. Co., 117 U. S. 312, 321 21
Pool Shipping Co., Ltd. vs. United States, 33 Fed. (2d) 275 ..... 20, 21

Ralli v. Societa Anonima, 222 Fed. 994 ..... 5, 20, 24
Ralli v. Troop, 157 U. S. 386 ..... 6, 8
Remorquage vs. Bennetts [1911], 1 K. B. 243 18
Robins vs. Flint, 275 U. S. 303 ..... 6, 9, 17, 18
Rockingham Mutual Fire Ins. Co. vs. Bosher, 39 Me. 253 17

Savings Bank vs. Ward, 100 U. S. 195 18
Simpson v. Thomson [1877], L. R., 3 App. Cas. 279 18
Steel Inventor, The (D. C.), 36 Fed. (2d) 399, p. 401 17

Williamson vs. Barrett, 13 How. [54 U. S.] 101, p. 110 13

Supreme Court of the United States

No. ..... —October Term, 1934.

Aktieselskabet "Cuzco", as owner of the Norwegian Steamship "*Toluma*",
Petitioner,

vs.

Steamship "*Sucarseco*", her engines, boilers, etc., Submarine Boat Corporation,
Respondent,

(and two other cases)

West India Oil Company and J. H. Senior, Agent, American Insurance Company, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Jurisdiction.

The decree below was entered August 14, 1934. R. 88.

Jurisdiction of the Court is provided by §347(a) of Title 28 of the United States Code.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Aktieselskabet Cuzco, owner of the Norwegian Steamship *Toluma*, prays that a Writ of Cer-

tiorari issue herein to review a decree of the Circuit Court of Appeals for the Second Circuit, entered on August 14, 1934, R. 88, modifying a final decree of the United States District Court for the Southern District of New York entered on February 23, 1934, R. 65-70, adjusting damages among two colliding vessels and owners of cargo on one of the vessels, arising from a collision between the Norwegian Steamship *Toluma*, and the American Steamship *Sucarseco*, which occurred at sea, off the Atlantic Coast, on the night of November 22, 1928; and, the petitioner respectfully shows unto this Court the following:

I. Statement of Matter Involved.

(a) *The Facts.*

It is agreed that the collision was caused by fault or errors in navigation of both vessels, and that the resulting damages were not caused or contributed to by unseaworthiness of the said vessels, nor by lack of due diligence on the part of the respective owners to make the vessels seaworthy in all respects, R. 47. It is not sought to review here any questions of negligent navigation or seaworthiness, therefore.

The steamship *Toluma*, which was operating as a common carrier, and which was laden with a general cargo, put back into the harbor of Norfolk, Va., to make repairs of the collision damages, and in order to effect the repairs, part of the cargo was discharged, and stored; and, after repairs, the cargo was reloaded, and the *Toluma* resumed and completed her voyage and delivery of her cargo to destinations. R. 50, 59.

There was not any direct physical damage to cargo resulting from the collision; and all expenses incurred at

the repair port, Norfolk, including discharge, storage, and reloading cargo, were paid by the petitioner. R. 48, 50.

The contracts of carriage (bills of lading) contained a condition whereby owners of cargo on the *Toluma* undertook to contribute with the shipowners (petitioner) in general average "to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit" as if the damage had not resulted from negligence of the carrier (*Toluma*). R. 52.

That condition of the contract of carriage, known as "the Jason Clause", reads as follows:

> "In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness." R. 52.

In fulfillment of the terms of that (special) contract, a general average statement was prepared, and cargo owners thereafter paid to the petitioner the ratable proportions shown by the adjustment, for expenses incurred by the petitioner at the repair port (principally the discharge of the cargo to make repairs).

(b) *The Suits.*

Both vessels having sustained damage, each sued the other, and the petitioner included among its items of damage the amounts paid by it on account of its port expenses, including the cost of discharging, storing, and reloading the cargo.

Cargo owners also sued the steamship *Sucarseco* and owners to recover the amounts [in full] which they (cargo owners) had contributed to the petitioner under the terms of the special contract between the petitioner, as owner of the *Toluma*, and the cargo owners (shippers), *i. e.*, "the Jason Clause," *supra*.

(c) *Decisions Below.*

1. The District Court allowed recovery by the petitioner [*Toluma*] from the *Sucarseco* of one-half of its damages, including the repair port expenses; and disallowed direct recovery by cargo owners from *Sucarseco* of the contributions which cargo owners made to the petitioner by reason of the terms of the contract of carriage, but awarded to cargo owners [recovery back] their proportionate part of one-half of the damages "of a general average nature" contributed by cargo owners, and which the petitioner recovered from *Sucarseco*. R. 59-64. Opinion reported in 4 F. Supp. 344.

2. The Circuit Court of Appeals for the Second Circuit modified (reversed) the District Court's decision, and awarded cargo owners recovery in full, direct from *Sucarseco,* of contributions [in full] which cargo owners made to the petitioner [*Toluma*] under the special contract, the Jason Clause; and thereby disallowed the petitioner recovery of expenses which it had incurred at the repair port, and thus reduced petitioner's recovery of its collision damages by one-half of the port expenses. R. 81. Opinion reported in 1934 A. M. C. 1083.

(d) *Opinions Below.*

1. The District Court (by Judge Robert P. Patterson) held, that there is not any obligation on cargo owners to contribute in general average to the losses (expenses) of the carrier, when the losses result from the carrier's negligence, under the decision of this Court in the case of *The Irrawaddy,* 171 U. S. 187; that, whereas the obligation may arise by operation of an express agreement between the carrier and cargo owner to share such expenses ("make contribution"), under the decision of this Court in the case of *The Jason,* 225 U. S. 32, that is a secondary liability only and does not entitle the cargo owner to a direct right of action against the other vessel, *Sucarseco* (non-carrier); but that the cargo owner may have an accounting from the carrier for a proportionate part of the carrier's recovery from the other vessel, *Sucarseco,* under the decision of the same Court in the case of *Ralli* v. *Societa Anonima,* 222 Fed. 994.

Moreover, the District Court found that cargo's contributions were voluntarily made, that is, because of the agreement with the carrier, *Toluma, i. e.,* the Jason Clause, and were too remote, as to *Sucarseco,* to be recoverable from

Sucarseco, under the decisions of this Court in the cases of *Robins* vs. *Flint,* 275 U. S. 303, and *Insurance Co.* v. *Brame,* 95 U. S. 754.

2. The Circuit Court of Appeals of the Second Circuit (by Judges MANTON, SWAN and CHASE) held in effect, that the expenses at the repair port were incurred by the master of the *Toluma* as agent for all concerned [*i. e.,* for cargo, as to its proportion], under the decision of this Court in the case of *Ralli* vs. *Troop,* 157 U. S. 386; that the ship owner [*Toluma*] was not obligated to make any sacrifices [incur expenses?] "to save cargo," under the decision of *The Jason,* 225 U. S. 32; that the expenses incurred [*i. e.,* cargo's proportion] were "sacrifices" made by cargo owners "to make it possible to complete the voyage and avert greater loss"; R. 84-5; that the condition of the contract of carriage, *i. e.,* the Jason Clause, is not a "diminution of the rights cargo would otherwise have," and by agreeing to contribute in general average in accordance with the provisions of the Jason Clause, cargo "secured" the right to have the shipmaster act as its agent "to make such sacrifices as may be timely and effective to avoid greater loss"; R. 86; that "the creation of the emergency" [collision] causes loss to cargo, with or without the Jason Clause, R. 87; and that the terms of the contract of carriage do not concern the tort feasor (*Sucarseco*); and that cargo may recover (in full) from the tort feasor *Sucarseco* (stranger to the contract) despite the principles laid down in the decisions of this Court in the cases of *Robins* v. *Flint,* 275 U. S. 303, and *Insurance Company* vs. *Brame,* 95 U. S. 754, "provided the legal relationship of cargo and carrier coupled with the occurrence of events for which the tort feasor is legally responsible creates a general average situ-

ation *that requires cargo to contribute*", (italics ours). R. 87.

(e) *Effect of decision.*

Whereas, under the ruling of the District Court, the petitioner would have recovered as collision damage one-half of all its port expenses from the joint tort feasor *Sucarseco*, and would then account to cargo (refund) the latter's proportionate part of the recovery; yet, under the ruling of the Circuit Court of Appeals the petitioner cannot recover that part of the port expenses which cargo owners agreed [voluntarily] to contribute, and which petitioner paid; and, cargo owners are awarded their contributions in full (direct from *Sucarseco*), which in turn offsets the full amount against the petitioner's recovery, with the net result that petitioner loses one-half of the port expenses which cargo agreed to contribute, amounting to nearly twenty thousand dollars here. R. 65-70.

In other words, although cargo owners were not obligated to pay anything to the petitioner by way of general average contributions, because of negligence of the petitioner's servants, but for the special contract between cargo owners and petitioner, cargo owners are now allowed to recover from the tort feasor, *Sucarseco*, as a direct collision damage, the full amount of their contributions voluntarily made to the petitioner.

The contract of carriage (*i. e.*, Jason Clause) is thus nullified.

II. Reasons for Allowance of Writ.

The petitioner seeks a review of the decision on the following grounds:

1. The matters involved are of great importance to commercial maritime interests, involving the relationships

of general carriers of cargo, shippers and owners of cargo, and marine insurance underwriters, both domestic and foreign. It may be said that relationships of these interests in every voyage of every general carrier of cargo to and from the United States are materially affected by this decision.

2. The subject of the law of General Average has heretofore received consideration by this Court in such outstanding cases as *Ralli* v. *Troop*, 157 U. S. 386 [decided April 1, 1895], *The Irrawaddy*, 171 U. S. 187 [decided May 31, 1898], and *The Jason*, 225 U. S. 32 [decided May 13, 1912]. While these decisions have settled the American law on the questions raised therein, there have arisen, in subsequent maritime commercial activities, controversial questions growing out of the practical application of the principles of law announced therein, particularly under the last cited case, which should receive the further consideration of this Court, as would be required in a review of the present decision.

3. This Court has not decided questions in the law of General Average raised herein, and because of the previous rulings of this Court in the cases cited under 2 above, and the progression and expansion of the principles therein promulgated to the present situation, it becomes necessary that this Court pass upon the decision herein, in order to settle disputable practices which have arisen.

4. The decision here seems so manifestly untenable, under all principles of law heretofore announced and applied by this Court, that it calls for the exercise of this Court's review.

5. The decision is in direct conflict with the controlling principle of the law of General Average as laid down in the

case of *The Irrawaddy*, 171 U. S. 187. If the master was acting solely as the agent of the cargo, insofar as cargo's interests were concerned, as found by the Circuit Court of Appeals here, the shipowner in the case cited would have been entitled to recover a general average contribution, whereas this Court held he was not so entitled.

6. The decision is in direct conflict with the controlling principle of the law of torts, as to recoverable damage, laid down in the case of *Robins* vs. *Flint*, 275 U. S. 303.

7. The decision is in direct conflict with the weight of authority on the subject involved.

III. The Sole Question Presented.

Whether a cargo owner, suffering no physical damage, and not liable as a matter of general maritime law for a general average contribution because the carrying vessel involved in a collision was negligent [*The Irrawaddy, supra*], may nevertheless sue and recover from the non-carrying vessel, although jointly negligent, a general average contribution paid to his own vessel solely because of a special contract between him and his own vessel, to make such a contribution, to which contract the non-carrying vessel was not a party.

It will be seen that the question here involved will arise in every mutual fault collision case where either of the vessels has cargo on board and is compelled to put into a port of refuge (a very frequent occurrence). It is obvious that, outside the Second Circuit, the maritime community will not be content to accept the decision herein as final, particularly in view of the intrinsic inconsistencies of the opinion. Until the Supreme Court decides the issue we

shall have and continue to have dispute and discord in the settlement of all such collision cases.

A certified copy of the transcript of record of all proceedings in the District Court and the Circuit Court of Appeals is presented herewith.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, demanding the said Court to certify and send to the Supreme Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the said Circuit Court of Appeals, in the said case entitled "Aktieselskabet 'Cuzco', as owner of the Norwegian Steamship *Toluma*, Petitioner, against Steamship *Sucarseco*, her engines, boilers, etc., Submarine Boat Corporation, Respondent, West India Oil Company and J. H. Senior, Agent, American Insurance Company, *et al.*, Respondents"; and that the said decree of the Circuit Court of Appeals in the said case may be modified by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray, etc.

AKTIESELSKABET "CUZCO,"

By WILLIAM H. MCGRANN,
Counsel for Petitioner.

November 9, 1934.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILLIAM H. MCGRANN, being duly sworn, says:

That he is counsel for the petitioner herein and that the foregoing petition is true to the best of his knowledge, information and belief.

WILLIAM H. MCGRANN.

Sworn to before me this }
9th day of November, 1934. }

JAMES A. CARNEY

(SEAL)

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

WILLIAM H. MCGRANN.

Supreme Court of the United States

OCTOBER TERM, 1934. No.....

AKTIESELSKABET "CUZCO", as owner of the Norwegian Steamship "*Toluma*",
Petitioner,

vs.

Steamship "*Sucarseco*", her engines, boilers, etc., SUBMARINE BOAT CORPORATION,
Respondent,

(and two other cases)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FIRST POINT.

THE PETITIONER [*Toluma*] WAS LEGALLY OBLIGATED TO MAKE REPAIRS AT THE PORT OF REFUGE AND DELIVER THE CARGO, OR RESPOND IN DAMAGES TO CARGO; AND THE PETITIONER HAS THE PRIMARY RIGHT OF RECOVERY FROM THE TORT FEASOR, *Sucarseco*, FOR THESE EXPENSES, DIRECTLY RESULTING FROM COLLISION.

The collision physically damaged the *Toluma* and interrupted the *Toluma's* voyage to the extent of requiring the

Toluma to proceed to a port of refuge in order to make repairs of collision damage. As a common carrier of cargo, *Toluma* was substantially an insurer, bound to make safe delivery at destination, and, consequently, apart from any considerations of adjusting expenses as between *Toluma* and her cargo by way of General Average, *Toluma* was obligated by law to complete her voyage, or sustain the consequential losses. *The Niagara* v. *Cordes*, 21 How. [62 U. S.] 7, pp. 28, 29; *The Maggie Hammond*, 9 Wall. [76 U. S.] 435, p. 458; *The Lady Pike*, 21 Wall. [88 U. S.] 1, pp. 14-15; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, pp. 440-1; *The Irrawaddy*, 171 U. S. 187, pp. 190, 195-6.

Under the principle of "*restitutio in integrum*," the expenses incurred by *Toluma* constitute an element of the damage recoverable direct from the tort feasor, *Sucarseco*, by *Toluma;* and, *Sucarseco* is *primarily* liable to *Toluma* for these expenses. *The Baltimore*, 8 Wall. [75 U. S.] 377, p. 385; *Williamson* vs. *Barrett*, 13 How. [54 U. S.] 101 (411), p. 110 (416); *The Conqueror*, 166 U. S. 110, p. 125; *The Margaret J. Sanford* (C. C., S. D. N. Y.), 37 Fed. 148, cases cited at page 152.

The ruling of the Circuit Court of Appeals here operates to deprive the petitioner of its right of action against *Sucarseco* for a portion of *Toluma's* damage comprised in the expenses which *Toluma* incurred, and paid, at the port of refuge.

SECOND POINT.

CARGO OWNERS WERE NOT OBLIGATED TO CONTRIBUTE TOWARD *Toluma's* PORT OF REFUGE EXPENSES UNDER THE MARITIME LAW OF GENERAL AVERAGE. THEIR OBLIGATION TO *Toluma* AROSE ONLY BECAUSE OF THE TERMS OF THEIR CONTRACT WITH *Toluma*, *i. e.*, THE JASON CLAUSE.

Since the *Toluma* was bound, as a common carrier, to complete her voyage, if reasonably possible to do so (as was the circumstance here), and was bound to make the necessary collision repairs at the port of refuge, in order to fulfill her obligations, cargo owners had the right to rely on *Toluma* to perform that duty, or respond in damages to cargo, cases *supra;* but, under the fundamental principle of the law of General Average, which prevents the Carrier from collecting contributions from Cargo toward expenses resulting from the negligence of the Carrier, Cargo owners were relieved of any liability whatever to contribute toward these expenses, although of a "general average nature." That principle of the law of General Average has been definitely established by this Court, in the case of *The Irrawaddy*, 171 U. S. 187, pp. 189-190, and 196-197.

The situation is then, that Cargo's only liability to contribute towards the expenses necessarily incurred by *Toluma* arose from the contract between the petitioner (*Toluma*) and Cargo owners, as expressed in the Jason Clause. R. 52. While that clause has been held to be valid by this Court, *The Jason*, 225 U. S. 32, that is, enforceable by and among the parties to the contract, it cannot and does not alter that fundamental principle of the law of General Average as above stated, ***The Irrawaddy, supra.***

Apparently the Circuit Court of Appeals has read into this Court's decision in the case of *The Jason*, 225 U. S. 32, an intention to overrule or modify its decision in the case of *The Irrawaddy*, 171 U. S. 187, and to the extent of engrafting into the law of General Average principles which are clearly unjustifiable.

Thus, it is said by the Court that by agreeing "to contribute in General Average though the Harter Act would otherwise excuse it from doing so," Cargo owners were thereby enabled to have the master act as Cargo's agent to make such sacrifices [incur expenses] as may be timely and effective to avoid greater loss. R. 86. Obviously, it did not require that Cargo should give such a consideration as waiving its rights to withhold contributions where the carrier is negligent, as the master was already obligated to act for Cargo's interests, if necessary.

The Court further states:

> "Since the Jason Clause is valid, it was lawful for the owners of cargo to ship it at their own risk so far as that clause made the risk theirs. And their liability to contribute in general average under this clause is in no true sense the less a general liability imposed by maritime law than it was when a general average situation was created as a matter of law merely by circumstances occurring on a voyage." R. 86.

That statement, so it is submitted, indicates a complete misconception of this Court's decisions in both *The Irrawaddy* and *The Jason*. The Circuit Court of Appeals implies that incorporation of the Jason Clause is coextensive with "a general liability imposed by maritime law," which, of course, is not so, certainly not as to parties in the position of *Sucarseco, i. e.*, strangers to the contract.

Finally, the Court concludes:

> "provided the legal relationship of cargo and carrier coupled with the occurrence of events for which the tort feasor is legally responsible creates a general average situation *that requires cargo to contribute*, it may then recover such contributions from the tort feasor, as in *The Energia*,* *supra*." R. 87. (Italics ours.)

That statement further confirms a conclusion that the Circuit Court of Appeals regards the decision in the case of *The Jason* as tantamount to overruling the previous decision of *The Irrawaddy;* otherwise, it shows that the Circuit Court of Appeals regarded the "legal relationship" established purely by the private contract as one which a tort feasor, stranger to the contract, must know or contemplate at his peril. *Post*, p. 18.

It is believed that a reading of the opinion of the Circuit Court of Appeals will disclose a confusion of a right under private contract with a right under maritime law, which is the basic error in the decision. In view of the two decisions of this Court, however, in the two cases cited, *i. e.*, *The Irrawaddy* and *The Jason*, it seems plain that the situation requires clarification, as the decision now stands.

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* Referred to on pages 22 and 23, *post*.

THIRD POINT.

THE LIABILITY TO CONTRIBUTE TO *Toluma's* EXPENSES WHICH CARGO OWNERS ASSUMED BY AGREEING TO THE JASON CLAUSE DOES NOT CONFER UPON CARGO OWNERS ANY RIGHT OF RECOVERY FROM OWNER OF *Sucarseco*, WHICH WAS A STRANGER TO THE CONTRACT.

The Jason Clause being no more than a private contract* limited in effect to the parties among whom it was made, *i. e., Toluma* and owners of Cargo on *Toluma;* it must follow that Cargo owners are squarely in the position of one who having sustained a loss solely because of his contract with another, seeks to recover that loss from a third party, whose tort would not have caused the loss [to Cargo owners] except for the terms of his contract, which were unknown to the tort feasor. The alleged damage is too remote to be actionable against *Sucarseco,* as has been well settled by the authorities. *Robins* vs. *Flint,* 275 U. S. 303; *Insurance Co.* vs. *Brame,* 95 U. S. 754; *The Federal No. 2* (C. C. A., 2nd Cir.), 21 Fed. (2d) 313; *The Steel Inventor* (D. S., S. D. N. Y.), 36 Fed. (2d) 399, p. 401; *Dale* v. *Grant,* 34 N. J. L. 142; *Anthony* v. *Slaid,* 52 Mass. 290; *Connecticut Insurance Co.* v. *New York R. R. Co.,* 25 Conn. 265; *Milton* v. *Story,* 11 Vermont, 101; *Rockingham Mutual Fire Ins. Co.* v. *Bosher,* 39 Me. 253; *Brink* v. *Wabash Railroad Co.,* 160 Mo. 87, and cases cited therein; also, *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller* (Court of Ap-

* Clause 12 of the Contract (Bill of Lading) incorporates the special rules of adjustment of General Average known as York-Antwerp Rules of 1890 and Antwerp Rule of 1903. These are not in strict accordance with American practice generally. See Appendix.

peal), [1922], 1 K. B. 127, 139, 142; *Remorquage* v. *Bennetts* [1911], 1 K. B. 243; *Anglo-Algerian S. S. Co., Ltd.* v. *The Houlder Line, Ltd.* [1908], 1 K. B. 659; *Earl* v. *Lubbock* [1905], 1 K. B. 253; *Simpson* v. *Thomson* [1877], L. R., 3 App. Cas. 279; *Cattle* v. *Stockton Waterworks Co.* [1875], L. R., 10 Q. B. 453.

This Court, by Mr. Justice Holmes, in the case of *Robins* v. *Flint*, *supra*, stated, at pp. 308-309:

> "But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *Savings Bank* v. *Ward*, 100 U. S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller* [1922], 1 K. B. 127, 139, 140. *Byrd* v. *English*, 117 Ga. 192. *The Federal No. 2*, 21 F. (2d) 313."

The case of *The Federal No. 2*, *supra*, which was a decision of the Circuit Court of Appeals for the Second Circuit, disallowed a claim of a shipowner against another tortious vessel owner, for expenses incurred for maintenance and cure of a seaman injured by the latter vessel, on the ground that the damage arose out of the contractual relationship between the shipowner and the seaman, although the expenses incurred directly resulted from the

injury. It is difficult to see how the Court can reconcile the present decision with its own decision in the case of *The Federal No. 2.* The distinction sought to be made by the Court was that in the present case the collision with the tortious *Sucarseco,* "was a direct contributing cause of the loss which was sustained by cargo." R. 86. The answer is that Cargo's "loss" arose solely by reason of its contractual relationship to its carrier, *Toluma.*

The District Judge summed up the situation of Cargo owners as follows:

> "Their loss arose only because of their contract with the carrier. The fact that the *Sucarseco* injured the *Toluma* does not make it liable to persons who incurred losses because of contracts with the owner of the *Toluma* that were rendered burdensome because of the injury. In the eye of the law such damages are too remote." (Citing cases.) R. 63.

FOURTH POINT.

SUCH RIGHTS AS CARGO OWNERS MAY HAVE HERE TO RECOVERY OF GENERAL AVERAGE CONTRIBUTIONS ARE SECONDARY TO *Toluma's* RIGHT OF RECOVERY FROM *Sucarseco,* AND DERIVATIVE ONLY.

According to Lowndes' General Average, 6th Edition, Introduction, the practice now recognized in maritime law as the law of General Average arose because of the need of insuring or indemnifying the several partners to a marine venture against loss and expenses incurred for the common benefit. General average is in reality a method of mutual protective insurance, therefore, and as stated in Cole's "General Average Law and Rules", it is a method of

"arriving at the same result which might be reached by the alternative plan of insurance". Recognizing this analogy, both the Circuit Court of Appeals of the Second Circuit, and the District Court of the Southern District of New York, have applied the principle of subrogation to the collection (refund) of Cargo's general average contributions. *Pool Shipping Co., Ltd.* vs. *United States*, 33 Fed. (2d) 275; *Ralli* v. *Societa Anonima*, 222 Fed. 994.

In the case of *Pool Shipping Company*, the steamship *Clearpool* was allowed recovery as part of the collision damages, of certain items toward which it had compelled contribution in general average from its cargo. In that case, however, the *Clearpool* was not at fault, and there was not any question as to the obligation of Cargo to contribute under the law of General Average. The Court regarded the tortious colliding vessel as "primarily liable" and the Cargo as "secondarily liable", to the *Clearpool;* and, that Cargo was "entitled to subrogation", so that "the recovery to the extent of any amount theretofore contributed by Cargo would be for its account". P. 277.

Also, in the case of *Ralli* vs. *Societa Anonima*, 222 Fed. 994, the late Circuit Judge Mayer, then sitting as a District Judge, invoked a similar analogy in determining Cargo's "refund" from its own carrier, of portions of collision damage recovered by the carrier from the non-carrying vessel. In that case which also arose from a collision, the suit was by Cargo on one vessel to recover from that vessel the proportion of its general average contributions, which had been recovered in part from the non-carrying vessel; and, the Court awarded to Cargo only that proportion of Cargo's contributions for which recovery had been made from the other (non-carrying) vessel (*i. e.*, one-half of Cargo's contributions).

These Courts thus clearly distinguished between the *direct* right of the carrier to recover all general average expenses from the tortious non-carrier, and the *derivative* right of Cargo owners making contributions to this carrier to recover back from the carrier only that proportion of their contributions which carrier directly recovers from the non-carrier. That is the logical and equitable application of the principles of marine insurance to the situation here. Cargo owners, as insurers *pro rata* of the expenses of a general average nature become *subrogees,* and, *"in any form of remedy"*, they can take only so much as the insured (*Toluma*) may take. *Phoenix Ins. Co.* vs. *Erie Transportation Co.*, 117 U. S. 312, p. 321. In the *Pool* case, *supra,* it so happened that they secured a refund in full, because the non-carrier was solely at fault; but, in the *Ralli* vs. *Societa* case, where both vessels were at fault, as here, they could take only *one-half,* which represented the quantum recovered directly by their carrier.

If the principle of single liability had been applied to the *Ralli* case, instead of adjustment on a basis of cross-liability, the recovery (refund) would have been proportionately less. *The North Star,* 106 U. S. 17, pp. 22, 28-29. The principle of single liability should apply here.

The analogy of the two decisions above cited to the present case is that Cargo owners, as insurers of *Toluma's* port of refuge expenses, *pro tanto,* cannot stand in any better position *vis-a-vis Sucarseco* in respect of the *quantum* of recovery than does *Toluma;* and, that Cargo's rights are subordinate to *Toluma's* rights, and derivative from *Toluma's* rights. That is, Cargo owners must be satisfied with the rights of a "subrogee" to take back from *Toluma* only Cargo's ratable portion of *Toluma's* recovery.

The District Court in the present case applied the insurance analogy and concluded that Cargo's "only basis of recovery against the other vessel is by subrogation to the right of the carrier," R. 63; and that "if the cargo owner has made good to the carrier part of the loss incurred, the carrier on later recovery against the other vessel must account to the cargo owner for a proportionate amount when the damages have thus been diminished." R. 62.

The Circuit Court of Appeals, disregarding the controlling principle of the law of General Average as announced in the case of *The Irrawaddy, supra, ante*, p. 14, and despite the authoritative decisions as to remoteness of Cargo's claim here against *Sucarseco, ante*, p. 17, invoked its early decision in the case of *The Energia*, 66 Fed. 604 to support its conclusion that Cargo's general average contributions stood on the same plane as a direct physical damage to cargo inflicted by *Sucarseco*, and that Cargo owners could therefore recover general average contributions from *Sucarseco*. R. 83.

The case of the *Energia* was considered by the District Judge, and he properly concluded that: "The case did not involve any of the questions presented here." R. 63.

In the case of *The Energia*, that vessel incurred port of refuge expenses because of a collision, and Cargo laden on board the *Energia* was required to contribute toward these expenses in General Average, under the English law, governing the place of destination of Cargo. As a result of a trial on the liabilities, as between the two colliding vessels, the *Energia* was held solely at fault, 56 Fed. 124. In a subsequent suit brought by Cargo against its Carrier, *Energia*, the Harter Act being not then in force (at collision), and the *Energia* not having any statutory defense,

Cargo was allowed recovery of all its damages, both physical damage and general average contributions, direct from *Energia.* The tort of the *Energia* there directly caused a situation which obligated Cargo, by force of the law of General Average, to pay its proportion of the port of refuge expenses. That is not the situation here, because Cargo was not obligated under the law of General Average, *The Irrawaddy, supra,* to make the contributions. The question is not presented here as to whether or not Cargo could recover from *Sucarseco* if Cargo had been obligated to make contribution under the law of General Average. On the contrary, the question is presented as to whether or not Cargo may recover from the joint tort feasor, *Sucarseco,* contributions in General Average which it was not obligated to pay to *Toluma* under the law of General Average. Certainly the ruling in the case of *The Energia* cannot be controlling in a situation where Cargo seeks to enforce against a third party tort feasor, who is a stranger to the contract (Jason Clause), losses which it sustained only by reason of its contract with its Carrier, *Toluma. Ante,* p. 17.

Nor do the decisions in *Erie & Western Trans. Co.* v. *Chicago,* 178 Fed. 42, and *Gray's Harbor Tugboat Co.* v. *Petersen,* 250 Fed. 956, cited in the Court's opinion, R. 83, support its ruling here. In both cases (collisions) the innocent *carriers* were allowed recovery of general average expenditures from the solely tortious *non-carriers,* where the General Average was compulsory under the law of General Average, and not the creation of a private contract (Jason Clause). Far from upholding the Court's ruling, these cases argue against it, for they support the principle that the carrier and not the Cargo Contributors have the *primary* right of recovery from the tortious colliding vessel.

The Court also cited the English case of *The Minnetonka* [1905], Prob. Div. 206, as supporting the Court's statement that "the same rule pertains in England." R. 83. The law of England cannot be applicable to the questions here, and "the same rule" could not obtain in England, because under English law Cargo may recover only one-half its damages from each of two vessels equally at fault in collision, or such percentage of its damages as may represent the comparative negligence of the two vessels, *The Measure of the Damages in Maritime Collisions*, 3rd Edition, by E. S. Roscoe, pages 20-22, and cases there cited; and, the law of England is substantially different to the American law, in respect of freedom of contract, *The Irrawaddy*, 171 U. S., pp. 194-195. English rulings cannot be paralleled with the American decisions on the questions here involved, therefore. But, the decision in *The Minnetonka* does not go so far as to hold that the Carrier's right of recovery is not the primary right, if asserted; and, the Court there undoubtedly regarded Cargo's right as derivative, and one of subrogation. The late Circuit Judge Mayer, in the case of *Ralli* vs. *Societa*, 222 Fed., pp. 999 and 1001, so regarded that decision. If this were not so, however, a decision of the Court of Appeal in England certainly could not be taken to justify our Circuit Court of Appeals in departing from principles so clearly announced by the Supreme Court as those here involved.

Finally, the decision of the Circuit Court of Appeals will result in upsetting long standing practices in adjustment of shipowners' liabilities *inter sese*,* and *vis-a-vis*

* The tabulated figures on page 1001 of the report of the decision in *Ralli* v. *Societa*, 222 Fed. 994, show that Cargo received back only one-half of Cargo's total contribution, and Judge Mayer stated that this conclusion had "support in the practice of average adjusters," p. 1001.

Cargo owners, and in the settlement of insurance liabilities; and will create multiplicity of suit and confusion in final adjustments of recoveries, as in some cases there are hundreds of different cargo owners, each of whom would have to sue the tortious non-carrying vessel.

But, entirely apart from these practical considerations, the decision is so inconsistent with principles of law heretofore accepted by shipping interests generally, that it should be reviewed by this Court.

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

WILLIAM H. MCGRANN,
Counsel.

New York, November 9, 1934.

APPENDIX.

During September, 1924, the International Law Association held its Thirty-Third Conference at Stockholm, Sweden. The report of that Conference forms a part of the record of the Association and is available at the office of the American Branch of the International Law Association, and at the law libraries. The maritime work at this particular Conference consisted in redrafting the York-Antwerp Rules of 1890, and formulating what we now know as the "York-Antwerp Rules of 1924."

American interests endeavored to defer the formulation and adoption of these new Rules at that time, as American interests concerned had not sufficiently considered the matter and were not prepared to take part in the proposed "codification" of general average practice. The American Steamship Owners Association (comprising the majority of American owners) deemed the matter of sufficient importance to be represented at the Conference, and to protest the final adoption of the rules at that time. There were representatives from all maritime nations, and, despite the American attitude, the rules were formulated, and are now used by a large number of foreign maritime interests.

Just as the York-Antwerp Rules of 1890 contain variances with the prior American practice, so the York-Antwerp Rules of 1924 are not wholly in accord with the American practice of general average adjusting.

The subject of the 1924 Rules occasioned a conference called by the Chamber of Commerce of the United States at Washington on March 16, 1925, which was attended by a large number of representatives of commercial, shipping, insurance, average adjusting, and legal interests. A Special Committee was appointed, which rendered a full report on the 1924 Rules, under date of May 15, 1925, and in which report several objections to the Rules were announced.

The United States Chamber of Commerce, on receipt of this report of the Special Committee, held a second confer-

ence on May 15, 1925, at which resolutions were adopted, containing among its preambles the statement that:

> "WHEREAS this Conference, on March 16th, 1925, adopted a resolution that the York-Antwerp Rules 1924 in the form submitted by the Stockholm meeting of the International Law Association are not acceptable to the commercial and shipping interests of the United States and that before the adoption and application of said Rules by American interests they should be modified in a number of important respects";

and otherwise expressing disapproval of the 1924 Rules.

The above action of the Chamber of Commerce was directed to effecting a reconsideration and possible modification of the Rules; but, on making representations to the Committee of the International Law Association the latter did not receive the suggestions favorably, and the attempt was unsuccessful.

Later, on February 15, 1925, the Special Committee of the Chamber of Commerce made a supplemental report, in which it was said:

> "We believe that all of our objections to the Rules are sound, and that some of them are so fundamental that they ought not to be waived."

The Committee then made certain specific recommendations as to incorporation in shipping documents of only parts of the Rules [together with the Jason Clause].

The result is that while the 1924 Rules are commonly accepted among foreign shipping interests, they are rarely used by American Shipping interests. Nevertheless, there are many instances of foreign ships trading to American ports where the ship and cargo agree by contract to adjust general averages under the 1924 Rules. So, a situation is possible, and indeed probable, whereby an American owner whose ship collides with a foreign ship would be called upon

to pay a general average expense adjusted under a rule which would not be acceptable to the American shipowner, that is, *if cargo on the foreign ship (as here) should be allowed to impose its private contract with a foreign ship upon an American shipowner, whose ship has the misfortune to collide with the foreign ship.*

The situation outlined above presents cogent reasons for disallowing direct recovery from the non-carrying vessel, otherwise the carrier and the cargo carried may impose upon the non-carrier special rules for adjusting general average, not known to nor contemplated by the non-carrier, and which might not be acceptable to the latter if it were contracting as a carrier with its own cargo.